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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE,

Plaintiff and Respondent,

v.

CORY WALLACE FERNANDEZ,

Defendant and Appellant.

C091540

(Super. Ct. No.
CRF100000256)

Appointed counsel for defendant Cory Wallace Fernandez asked this court to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).) Finding no arguable error that would result in a disposition more favorable to defendant, we will affirm the trial court's order denying the petition for resentencing.

I. BACKGROUND

Defendant and his friend, the attempted murder victim, got into an altercation. (*People v. Fernandez* (May 1, 2013, C070130) [nonpub. opn.].)¹ The victim challenged defendant and said he would kick his ass. Defendant told the victim to “check out what [he] had for him,” shouldered a .22-caliber long rifle, and shot the victim, who was standing six to 10 feet away. The bullet lodged in the victim’s shoulder blade and caused his right lung to collapse. (*Ibid.*) In 2011, defendant was convicted of a number of offenses, including attempted murder (Pen. Code, §§ 664/187, subd. (a)).² He was sentenced to an aggregate term of 25 years to life, plus nine years four months. We affirmed the conviction in 2013, finding sufficient evidence of a specific intent to kill. (*People v. Fernandez, supra*, C070130.)

The Legislature enacted and the Governor signed Senate Bill No. 1437 (2017-2018 Reg. Sess.), effective January 1, 2019 (Stats. 2018, ch. 1015), determining that the change in law was “ ‘necessary to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.’ ” (*People v. Superior Court (Gooden)* (2019) 42 Cal.App.5th 270, 275.) As pertinent here, Senate Bill No. 1437 added section 1170.95, which permits a person convicted of felony murder or murder under a natural and probable consequences theory, to petition the sentencing court to vacate the murder conviction and resentence the person on any remaining counts if, among other things, the petitioner could not be convicted of first or second degree murder due to the change in the law. (§ 1170.95, subd. (a).)

¹ Defendant requested we take judicial notice of the record in case No. C070130. We construed the request as a motion to incorporate by reference and granted the motion.

² Undesignated statutory references are to the Penal Code.

In December 2019, defendant filed a petition to vacate his attempted murder conviction and for resentencing under section 1170.95. The petition alleged he had been convicted of attempted second degree murder under the felony-murder rule or the natural and probable consequences doctrine, but that due to changes in sections 188 and 189 he could not now be so convicted. He also requested appointment of counsel during the resentencing process.

The trial court summarily denied defendant's petition without appointing counsel or receiving briefing from the parties, finding the case did not involve the natural and probable consequences doctrine.

II. DISCUSSION

Appointed counsel filed an opening brief setting forth the facts of the case and asking this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing the opening brief. Defendant filed a supplemental brief claiming he did not have the requisite mental state for attempted murder and the denial of his petition violated his due process and equal protection rights.

Whether the protections afforded by *Wende, supra*, 25 Cal.3d 436 and the United States Supreme Court decision in *Anders v. California* (1967) 386 U.S. 738 [18 L.Ed.2d 493] apply to an appeal from an order denying a petition brought pursuant to section 1170.95 remains an open question. The California Supreme Court has not addressed the issue. The *Anders/Wende* procedures address appointed counsel's representation of an indigent criminal defendant in the first appeal as a matter of right and courts have been loath to expand their application to other proceedings or appeals. (See *Pennsylvania v. Finley* (1987) 481 U.S. 551 [95 L.Ed.2d 539]; *Conservatorship of Ben C.* (2007) 40 Cal.4th 529; *In re Sade C.* (1996) 13 Cal.4th 952; *People v. Dobson* (2008) 161 Cal.App.4th 1422; *People v. Taylor* (2008) 160 Cal.App.4th 304; *People v. Thurman*

(2007) 157 Cal.App.4th 36; *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570.)

Nevertheless, in the absence of California Supreme Court authority to the contrary, we adhere to *Wende* in the present case where counsel has already undertaken to comply with *Wende* requirements.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

III. DISPOSITION

The trial court's order denying the petition for resentencing is affirmed.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

ROBIE, J.